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IN THE
Supreme Court of the United States
OCTOBER TERM 1943

No. 62

UNITED STATES OF AMERICA,

against

Appellant,

BAUSCH & LOMB OPTICAL COMPANY *et al.,*

Appellees

No. 64

SOFT-LITE LENS COMPANY, INC. *et al.,*

against

Appellants,

UNITED STATES OF AMERICA,

Appellee

Appeals from the District Court of the United States
for the Southern District of New York

BRIEF FOR SOFT-LITE LENS COMPANY, INC.,
NATHANIEL SINGER, AND R. G. LANDIS

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BAUSCH & LOMB OPTICAL COMPANY, M.
HERBERT EISENHART, BEN A. RAMAKER,
JOSEPH F. TAYLOR, SOFT-LITE LENS COM-
PANY, INC., NATHANIEL SINGER, R. G.
LANDIS,

Appellees

SOFT-LITE LENS COMPANY, INC., NATHANIEL
SINGER, R. G. LANDIS,

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for the Southern District of New York

**BRIEF FOR SOFT-LITE LENS COM-
PANY, INC., NATHANIEL SINGER,
AND R. G. LANDIS**

I. Opinion Below

The opinion of the District Court is reported in 45 F.
Supp. 387 (1942). It is printed at R. 19-37.

II. Jurisdiction

The final judgment of the District Court was entered February 1, 1943 (R. 60). The petitions for appeal were filed in and granted by the District Court April 1, 1943 (R. 65, 71, 79). Probable jurisdiction was noted by this Court June 1, 1943 (R. 1016).

This Court has jurisdiction by virtue of Section 2 of the Expediting Act of February 11, 1903 as amended (32 Stat. 823, 36 Stat. 1167, 15 U. S. C. § 29) and Section 238 of the Judicial Code as amended (36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. § 345).

III. Statement of the Case

A. The Complaint

It is alleged (R. 3) that Bausch & Lomb Optical Company, a manufacturer of lenses and ophthalmic glass for lenses, and its officers Eisenhart, Ramaker, and Taylor, and Soft-Lite Lens Company, Inc., a distributor of tinted lenses, and its officers Nathaniel Singer, Landis, and Morris Singer (as to whom the complaint was dismissed for want of evidence), conspired to restrain trade in tinted lenses in violation of Sections 1 and 3 of the Sherman Act.* It is charged (R. 6) that they agreed

*"SECTION 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal: *Provided*, That nothing herein contained shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trade mark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity

“(a) to designate and select, according to certain arbitrary rules and regulations, wholesalers and retailers to handle, deal in, and sell certain tinted lenses known as Soft-Lite lenses;

“(b) to sell such tinted lenses only to such designated and selected wholesalers and retailers;

“(c) to restrain such wholesalers and retailers from selling to other wholesalers and retailers not so selected;

“(d) to force such wholesalers and retailers to observe certain arbitrary and unreasonable prices in reselling such tinted lenses; and

“(e) to limit the sale and distribution in interstate trade and commerce of tinted lenses similar to Soft-Lite lenses.”

It is asserted that the two groups of defendants, Bausch & Lomb and Soft-Lite,

“conspired to establish and maintain a closely regulated scheme of distribution by means of which the defendants would control completely all phases of the marketing of certain unpatented tinted lenses, including the selection

is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 5, as amended and supplemented, of the Act entitled ‘An Act to create a Federal Trade Commission, to define its powers and duties, and for other purposes’, approved September 26, 1914: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. . . .”

“SEC. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories and any State or States or the District of Columbia, or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. . . .” 26 Stat. 209. (1890), as amended 50 Stat. 693 (1937), 15 U. S. C. §§ 1, 3 (1940).

and designation of wholesalers and retailers of such lenses and the fixing and maintenance of minimum resale prices of such lenses" (R. 7):

and that pursuant thereto.

(a) Bausch & Lomb manufactured certain unpatented tinted lenses and unpatented tinted ophthalmic glass from which such lenses are made exclusively for Soft-Lite, and has declined to manufacture such lenses and glass for customers other than Soft-Lite (R. 7);

(b) Bausch & Lomb sells its entire output of such lenses, called Soft-Lite lenses, to Soft-Lite, but repurchases from Soft-Lite approximately two-thirds of the lenses so sold for distribution to retailers through Bausch & Lomb wholesale branches (R. 7);

(c) the defendants cooperate in promoting Soft-Lite lenses, and Bausch & Lomb has agreed with Soft-Lite as to wholesalers' resale prices and as to the wholesalers and retailers who should be designated to deal in the lenses (R. 7);

(d) Soft-Lite sells only to wholesalers who adhere to rules and charge prices fixed by the defendants (R. 7, 8); and

(e) the defendants have controlled the activities, prices, and practices of retailers (R. 9).

The plaintiff prays that the alleged conspiracy and practices be adjudged illegal, that agreements between Bausch & Lomb and Soft-Lite relative to distribution of lenses be declared illegal, and their performance or renewal enjoined, and that the Soft-Lite distribution system be cancelled (R. 10).

B. The Findings and Judgment

Finding that the Bausch & Lomb defendants have not conspired among themselves or with the Soft-Lite defend-

ants (R. 58), the court held that the exclusive manufacturing agreement between Bausch & Lomb and Soft-Lite is legal and valid, not in violation of the Sherman Act, and forms no part of the Soft-Lite licensing and distribution system (R. 59); and the complaint was dismissed as to the Bausch & Lomb defendants on the merits (R. 64).

The court found and adjudged that the Soft-Lite defendants have conspired with each other and with wholesalers and retailers in violation of the Sherman Act

(a) by entering into license agreements with retailers which fix the prices at which retailers shall sell Soft-Lite lenses,

(b) by entering into license agreements with retailers which provide that retailers will sell such lenses only to the public,

(c) by entering into agreements with wholesale customers which provide that they will sell Soft-Lite lenses and blanks only to retailers designated as licensees,

(d) by entering into agreements with wholesale customers which fix the prices at which wholesalers shall sell such lenses and blanks,

(e) by entering into Fair Trade resale price maintenance contracts with wholesalers as part of the Soft-Lite distribution system (R. 61).

The license agreements between Soft-Lite and retailers were declared null and void and Soft-Lite was required to cancel them by notice to the retailers (R. 61).

Each agreement between Soft-Lite and wholesale customers which provides that wholesalers will sell Soft-Lite lenses and blanks only to retailers designated as licensees by Soft-Lite, or which fixes the prices at which wholesalers

shall sell Soft-Lite lenses, was adjudged illegal, and Soft-Lite was required to cancel the same by notice (R. 62).

Each Fair Trade resale price maintenance contract under the trade marks of Soft-Lite now in effect between the company and wholesale customers which fixes the minimum or stipulated resale price for Soft-Lite lenses was held illegal, and Soft-Lite was required to give notice of cancellation (R. 62).

A perpetual injunction against the Soft-Lite distribution system (other than future Fair Trade contracts) was granted (R. 62). Execution of Fair Trade contracts was enjoined for a period of six months (R. 63). Soft-Lite was enjoined for six months from systematically suggesting wholesale, prescription, or consumer prices on Soft-Lite lenses or blanks (R. 63).

Attached to the judgment is a provision allowing discovery, as follows:

"That for the purpose of securing compliance with this Judgment, authorized representatives of the Department of Justice, upon the written request of the Attorney General or an Assistant Attorney General, shall be permitted access, within the office hours of the said defendants, and upon reasonable notice, to books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or the control of the said defendants, or any of them, relating to any of the matters contained in this Judgment, such access to be subject to any legally recognized privilege. Any authorized representative of the Department of Justice, subject to the reasonable convenience of the said defendants, shall be permitted to interview officers or employees of said defendants without interference, restraint or limitation by said defendants; provided, however, that any such officer or employee may have counsel present at such interview. Said defendants,

upon the written request of the Attorney General, or an Assistant Attorney General, shall submit such reports with respect to any of the matters contained in this Judgment as from time to time may be necessary for the purpose of enforcement of this Judgment; provided, however, that the information obtained by the means permitted in this paragraph shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice except in the course of legal proceedings in which the United States is a party or as otherwise required by law." (R. 63)

There is provision for a stay pending appeal (R. 65).

Anticipating our statement of issues and our argument, our position as to the findings and judgment is briefly as follows:

The judgment is correct and must be affirmed as regards the Bausch & Lomb defendants and the Bausch & Lomb-Soft-Lite relationship.

Our understanding of the effect of recent decisions (*e. g.* *United States v. Univis Lens Co., Inc. et al.*, 316 U. S. 241) leads us to concede that agreements between Soft-Lite and retailers restricting the retailers' choice of customers and resale prices should be enjoined.

The judgment must be reversed in so far as it relates to Soft-Lite's relations with wholesalers. It is contrary to the decision in *United States v. Colgate & Company*, 250 U. S. 300, and the Miller-Tydings amendment to Section 1 of the Sherman Act (50 Stat. 693)..

The provision for discovery must be vacated as in violation of rights guaranteed by the Fourth and Fifth Amendments.

C. Statement of Facts

To state it bluntly but accurately, the real object of this case is to put a small independent company out of business. If the agreement for manufacture of Soft-Lite lenses and glass by Bausch & Lomb is cancelled, if Soft-Lite's relations with wholesalers are condemned and enjoined as demanded by the plaintiff—if the extreme relief sought by the prosecution is granted, Bausch & Lomb will survive, and so will all of Soft-Lite's competitors, but Soft-Lite will be so crippled and hampered as to be incapable of carrying on the sale of its product in competition with others not so restricted. A brief statement of the essential facts will satisfy the Court that no such result is required for the protection of the trade or of the fraction of the public which wants and wears pink-tinted glasses.

Manufactured by Bausch & Lomb according to Soft-Lite's specifications, Soft-Lite lenses and glass for lenses are purchased from Bausch & Lomb by Soft-Lite and sold by Soft-Lite to wholesalers (including wholesalers affiliated with Bausch & Lomb); they are then sold by the wholesalers to retailers, by whom they are fitted as eyeglasses or spectacles and sold as such to wearers. That is the business we are concerned with; the trade allegedly restrained. Pleading, tried, and briefed as if it were an antitrust case of the first order, the proceeding is chiefly important, not to the optical business or even to the public, which will continue to have access to lenses of all kinds and colors, but to the small group of Soft-Lite defendants who will be ruined if measures of the sort and severity granted below and demanded on appeal are applied.

Soft-Lite is the registered trademark of the pink-tinted lenses introduced by Morris Singer, father of Nathaniel, in

his retail optical stores in New York City (Ex. I, R. 963; 451-2). Manufactured since 1924 by Bausch & Lomb, a manufacturer of optical goods of the highest quality, Soft-Lite lenses avoid or relieve visual discomfort and fatigue by reducing glare (Ex. 39, 40, R. 685, 692; 163, 545).

The claim that the lenses are of high quality, that they absorb glare-producing rays without undue distortion of vision, and that they are otherwise superior to other tinted lenses stands uncontradicted (Ex. 39, 40, R. 685, 692; 163).

The lenses and the tinted glass from which they are made are not patented but are made according to specifications given to Bausch & Lomb by the Singers (R. 466).

The Soft-Lite Company is a small independent concern having but one line of business, namely, the sale of Soft-Lite lenses and glass to wholesalers. Thanks to the initiative of Morris Singer and to the sales ability and energy of Nathaniel Singer and his associate Landis, and the merit of its product, the company has gradually increased its sales, both in units and relative to the trade, so that it enjoys a substantial, profitable business; but it is only one of a number of companies, large and small, including Bausch & Lomb itself, which deal in tinted lenses. Soft-Lite's competitors carry full lines of optical goods, including a number of brands of tinted lenses (R. 456).

Nathaniel Singer joined his father in 1919. By 1922 the son had decided that Soft-Lite lenses could be sold on a national basis, and father and son incorporated Optical Service Corporation to carry out such a program (R. 81-2, 451). In 1929 the name of Optical Service Corporation was changed to Soft-Lite Lens Company, Inc. (R. 81).

As president, general manager, and sales manager, the younger Singer travelled over the country preaching the gospel of Soft-Lite to wholesalers and retailers and to oculists, opticians, and their patients (R. 81, 452). His reward was meager and slow in coming; as late as 1924 Soft-Lite sales amounted to about \$59,000 (R. 87).

When Soft-Lite lenses were introduced by Morris Singer, and for some time thereafter, the tinted glass was imported from France, where it was made according to Singer's specifications, and was ground into lenses by a number of American manufacturers (R. 86, 462). This was not satisfactory, especially when plans to expand the business were in the making, for there was no assurance of a regular supply of uniform quality (R. 462).

None of the Soft-Lite defendants had any contact with Bausch & Lomb until early in 1924, when Nathaniel Singer arranged through the company's New York City representative for the fusing of a number of bifocal lenses from his French glass (R. 460-2). The operation was so successful that in May 1924 Singer went to the office of the company at Rochester to attempt to arrange for the grinding of all his lenses; and on June 11, 1924 Bausch & Lomb agreed to grind Soft-Lite lenses out of glass imported by Singer (Ex. 1A, R. 633; 101). In connection with this arrangement Soft-Lite gave Bausch & Lomb a list of its customers so that special orders requiring grinding of a different kind from that done by the wholesalers could be filled by Bausch & Lomb direct—thus saving considerable time. Bausch & Lomb billed Soft-Lite for these special orders and agreed that any other orders for pink-tinted lenses received by it would be forwarded to Soft-Lite (Ex. 1A, 1B, R. 635, 637; 101, 107-8).

In August 1924 Bausch & Lomb became the manufacturer of the pink-tinted glass from which Soft-Lites are ground. Having regard to the origin and nature of the product and the relative prestige, size, and facilities, including sales staff and outlets, of the two companies, Soft-Lite required protection against manufacture of Soft-Lite lenses for others and against competition by Bausch & Lomb in the sale of the lenses (R. 103). The agreement giving Soft-Lite such strictly limited protection was confirmed September 13, 1926, as follows:

"Mr. Nat Singer
c/o Optical Service Corp.,
Knickerbocker Building,
Times Square, New York City.

Dear Nat:

I have given the matter of our manufacturing for you Soft-Lite Glass and lenses considerable thought.

Since the very beginning of our relations with you, in connection with this transaction, it has been understood that we would safeguard your interests in every way and it has never been our intention to make competition for you by either marketing a tinted lens of our own or producing similar tinted glass for other manufacturers and it is our intention to abide by this understanding.

On the other hand, however, it is difficult to foresee the progress of science in producing glass possessing better properties than is obtainable at the present time and in that event we feel certain that you would not in any way desire to impede our progress in that direction.

We hope that this may be sufficient guarantee to you that we do not wish to do anything that would look like competition in connection with the Soft-Lite and we naturally expect that your efforts in the sale of

same will be continued as at present for an indefinite period unless by consent of both parties concerned a different arrangement is agreed upon.

Yours very truly,

[EDWARD BAUSCH, President]

BAUSCH & LOMB OPTICAL CO.

P. S.—Tinted lenses such as Crookes, Fieuzal, Smoke, Amber, etc., which we are now manufacturing, it is understood will not come under the above arrangement."

(Ex. 3, R. 639; 99)

The "progress of science" as to which Bausch & Lomb reserved freedom of action materialized, and on July 6, 1932, in connection with an application for patent on its Nokrome lenses, Bausch & Lomb advised Soft-Lite as follows:

"Mr. Nat Singer

Soft-Lite Lens Company,

119 West 57th Street, New York City.

My dear Nat: Confirming our recent conversation held in your office in New York, I should be glad to state our position regarding your request in connection with our patent application for improvement in the manufacture of Soft-Lite Nokrome lenses.

Insofar as the marketing of product manufactured under this patent involves the use of Soft-Lite glass as such, we are willing to grant you the exclusive distribution under the same general conditions as we have agreed to in the letter written by our company to you under date of September 13, 1926. In this letter we assured you that we did not intend to market a tinted lens to make competition for you, but reserved the right to market directly a glass of the selective filtering type when, with the progress of science, there should be developed a satisfactory glass to meet such requirement.

This letter, we believe, is in accordance with the request which you made and we hope will meet the situation satisfactorily.

Very truly yours,

[M. H. EISENHART, President]

BAUSCH & LOMB OPTICAL Co."

(Ex. 5, R. 641; 104)

For a time Soft-Lite was obliged to accept second as well as first quality lenses from its manufacturer. Some time before 1935 Soft-Lite was released from this obligation and Bausch & Lomb agreed to sell Soft-Lite seconds abroad (R. 106-7, 108-15).

Having Soft-Lite as the outlet for an important fraction of its lens output, Bausch & Lomb has taken a natural, prudent, and legitimate interest in Soft-Lite business. There have been many conferences and frequent exchanges of information relative to all aspects of the business, including prices (see *e. g.* R. 604, 617, 232), and as the business has grown and flourished, the personal relations of the Bausch & Lomb employees concerned with lens sales and Singer and his associates have become close (R. 232).

As a condition of price reductions to Soft-Lite, Bausch & Lomb has insisted that the benefits be passed on to purchasers from Soft-Lite (R. 603-4, 386-7), but there is no substantial evidence that Bausch & Lomb ever joined with Soft-Lite in fixing prices to wholesale houses or to retailers or consumers; and, except for the exclusive manufacturing agreement required by Soft-Lite, Bausch & Lomb has retained and has exercised complete freedom of decision (R. 231-2, 374-5, 380, 604).

The following table indicates the degree to which, in recent years, Singer's sales ability and effort and the com-

pany's expenditures for national advertising (aggregating about \$2,000,000) have been productive:

Year	Pairs of lenses sold	Gross sales price
1938	447,171	\$807,000
1939	518,129	910,000
1940	563,113	987,000

(Ex. 207, R. 955)

Soft-Lite, a relatively small, one-brand concern having no manufacturing or wholesale facilities of its own, enjoys no monopoly. It holds no patent. Its gradual growth in sales and profits is attributable solely to the intrinsic merit of its product, to good management, and to smart, aggressive salesmanship.

Soft-Lite has struggled to overcome the preference for white glass. It has faced the competition of colored lenses of all sorts, many of them made and sold by larger, more powerful companies, such as Bausch & Lomb and American Optical Company. And having achieved a fair measure of success, it has had to meet the claims of imitators of its pink-tinted lenses—American Optical, Titmus, Continental, Shuron, and others (R. 546-9). From 1938 to 1940 sales of pink-tinted lenses by the companies named and Soft-Lite were:

Year	Total pairs of lenses sold	Gross sales price
1938	1,150,523	\$1,598,179
1939	1,406,713½	1,887,868
1940	1,433,583½	1,939,502

(Ex. 207, R. 955)

Selling a nationally advertised quality product, Soft-Lite selects its customers with care. It sells to the whole-

sale affiliates of Bausch & Lomb, whose manufacture of its lenses is featured in Soft-Lite advertising (R. 123). It does not sell to the wholesale branches of its chief rival, American Optical Company, or to wholesalers whose volume is considered too small for profitable operation, or to wholesalers whose credit is regarded as unsatisfactory, or to wholesalers whose practices are not approved (Ex. 16, 17, 18, R. 654-5; 136, 129-31).

Soft-Lite has never had agreements with wholesalers, written or oral, except that since 1940 a number of Fair Trade contracts authorized by the Miller-Tydings amendment of Section 1 of the Sherman Act (50 Stat. 693) have been entered into (R. 530, 455).

One-half of the 30,000 oculists and optometrists in the United States are active purchasers of lenses. 7500 of these sell Soft-Lite lenses (R. 372-3).

Soft-Lite's promotional work and advertising stress the business and interests of retailers. Until 1927, however, there was no attempt to bind retailers by agreement. In that year Soft-Lite introduced the practice of having each stock retailer sign an "Application for a Soft-Lite Licensee Privilege" (Ex. 12, R. 652; 126). Submitted to a wholesaler, the application was subject to the approval of Soft-Lite. In it the retailer stated that he was "a recognized high grade ethical optical concern cognizant of the standards and principles upon which licenses for Soft-Lites are granted", that he subscribed to these principles, and that he had placed an order for a certain number of pairs of Soft-Lite lenses. The "principles" referred to were not spelled out, but the inference was that the "privilege" might be withdrawn if the applicant's practices or prices did not suit Soft-Lite.

In 1933 Soft-Lite introduced formal licenses in which it was stated as a condition of the right to deal in Soft-Lite lenses and blanks (glass requiring certain finishing operations) that, subject to the right of Soft-Lite to revoke the license, the retailer will sell the lenses "at prices prevailing in the locality in which Licensee conducts his practice or business," and that Soft-Lites "shall be sold . . . only to the patient or consumer" (Ex. 43, 44, 45, R. 699, 701, 705; 169-71). Modified in respects not here material (R. 171), this form of license was in use up to the time of the trial.

Another feature of retail distribution is the numbered "Protection Certificate", supplied by Soft-Lite to wholesalers, and by them to the retail trade, intended to accompany each ultimate sale and to give assurance of the genuineness of the article purchased, and at the same time to enable Soft-Lite to trace the sale—an ability seldom exercised (R. 563).

Because of the infinite variety of eye conditions, prescriptions, and foci, the pricing of lenses and glass for lenses is a complex and difficult matter; and, like all other distributors of lenses, Soft-Lite publishes price lists showing suggested prices of wholesalers to retailers (R. 542-3, 454-5, 477). The company has never issued suggested retailers' prices or established a uniform retailer-consumer price, except on one occasion and to an extent regarded by the District Court as negligible (45 F. Supp. 387, 393; Finding 26, R. 57).

Soft-Lite glass is used in some of the patented Orthogon and Panoptik lenses made and sold by Bausch & Lomb. In consequence the companies entered into a number of arrangements relative to the distribution of the patented lenses. Thus Orthogon licensees of Bausch & Lomb were permitted to purchase Orthogon Soft-Lites, Soft-Lite's

stock licensees (those equipped to carry on certain finishing operations) might buy uncut Orthogon Soft-Lites. Orthogon "franchise dealers" were listed as Soft-Lite "prescription licensees". Panoptik licensees might buy Panoptik Soft-Lites. Soft-Lite licensees might not deal in Panoptik bifocals unless they were licensed by Panoptik. (R. 156-8)

A partial summary judgment was entered July 20, 1942 in another case, *United States v. Bausch & Lomb Optical Company et al.*, Civil 10-394, Southern District of New York, C. C. H. Tr. Reg. Serv. Court Decisions 1941-3 ¶52, 916, which contained an injunction against the Panoptik license system. (The judgment, entered without opposition by the defendants, resulted from the decision in the *Univis* case, 316 U. S. 241.) Accordingly, during August 1942 Bausch & Lomb notified all licensees that Panoptik licenses were canceled.

Bausch & Lomb also notified the Department of Justice in a letter dated June 2, 1942 that all Orthogon licenses had been canceled pursuant to a letter sent to Orthogon licensees on May 27, 1942.

As a result of the action taken by Bausch & Lomb, Soft-Lite subsequently notified all its wholesalers that there were no longer any restrictions on the sale of Orthogon or Panoptik Soft-Lites.

We need not, therefore, discuss further the relations between Bausch & Lomb and Soft-Lite in connection with these so-called licensing privileges.

We have not attempted to state or even summarize all the evidence. We have examined the proof in enough detail to venture the opinion that the Government's claims, expressed in the extreme terms characteristic of monopoly

cases, are greatly exaggerated. What it comes down to is this:—

Possessing a useful and attractive article and plenty of initiative, energy, and sales ability, the Singers and Landis have established a prosperous one brand business. Subject to the exception hereafter noted, they have not restrained trade—they have originated and developed it. There is no absence of competition—if anything, there is evidence of an excess of it.

The Soft-Lite defendants have created a substantial market for their pink-tinted lenses. At the same time they have greatly stimulated the demand for colored lenses of all sorts. They are, in a sense, victims of the highest form of flattery—imitation.

The Soft-Lite defendants have not injured the public. They sell it something it needs and wants; and by promoting the practice of ethical oculists and opticians they have raised the standard of optical treatment and sales.

It is submitted that the manufacturing arrangement with Bausch & Lomb is essential to Soft-Lite; that it is fair, reasonable, and well within the rights of the parties under the Sherman Act; and that its cancellation would be ruinous to Soft-Lite and correspondingly beneficial to its many competitors.

It is submitted that Bausch & Lomb's interest in and activity in respect of Soft-Lite's practices and prices is normal and proper and well within its legal rights.

It is submitted that Soft-Lite's relations and arrangements with wholesalers should not be condemned or in any respect enjoined.

In regard to provisions in its retail licenses restricting the retailers' choice of customers and prices, it is conceded that Soft-Lite has gone too far and that the judgment should be affirmed to the extent that it requires cancellation and enjoins renewal of such provisions.

IV. Specification of Errors and Statement of Issues

There are two appeals.

In No. 62 the Government assigns as error the refusal of the District Court to grant all of the relief demanded.

In No. 64 the Soft-Lite defendants complain of certain features of the judgment granted.

The Government assigns twenty-five alleged errors (R. 66-71). In order to submit a single, coordinated brief in opposition to the Government's appeal and in support of the Soft-Lite defendants' appeal three weeks before the case is called for hearing (Rule 27), when the Government's brief must also be submitted, and to obviate or at least reduce the length of reply briefs, we have endeavored to anticipate the Government's points and have arranged our brief accordingly.

We think the Government will contend that the Bausch & Lomb defendants, as well as the Soft-Lite defendants, are parties to the alleged Sherman Act conspiracy, and that the manufacturing agreement between Bausch & Lomb and Soft-Lite is illegal and is part of the alleged illegal Soft-Lite distribution system (Gov't Assignment of Errors 1-13, 24, R. 66-70).

In opposition to this we shall argue that the agreement to supply pink-tinted lenses and blanks only to Soft-Lite is directly ancillary to the main purpose of the manufacturing contract and thus a reasonable restraint under the Sherman Act. We shall also argue that there is no agreement between Bausch & Lomb and Soft-Lite with reference to the latter's distribution system.

The Government may argue that the court erred in refusing (a) to require the Soft-Lite defendants to sell to anyone who offers to pay cash therefor (Ass. 21, R. 69-70), (b) permanently to enjoin said defendants from systematically suggesting resale prices (Ass. 22, R. 70), and (c) permanently to enjoin them from executing Fair Trade contracts (Ass. 23, R. 70).

In answer to such arguments, and in support of our contention that the judgment goes too far in certain respects, we shall demonstrate that the court erred in holding that the Soft-Lite distribution system constitutes illegal agreements with wholesalers to charge uniform prices to retailers and to boycott retailers, and requiring the cancellation thereof, and in restraining Soft-Lite from systematically suggesting wholesale or consumer prices for six months; and that it erred in holding illegal Fair Trade resale price maintenance contracts between Soft-Lite and wholesalers, and requiring cancellation thereof, and in restraining Soft-Lite from executing any such contracts for six months (Def'ts' Assignment of Errors 1, 3, 4, 7, 8, 9, 10, 13, 14, 18, 19, 21, 23, 24, 26, 27, 29, 30, R. 72-8).

We shall show that the court correctly refused to enjoin Soft-Lite from engaging in interstate commerce unless it agrees to sell its lenses and blanks to anyone who offers and is willing to pay cash therefor.

And we shall argue that the provision of the judgment allowing future discovery by the Government must be vacated as in violation of the Soft-Lite defendants' rights guaranteed by the Fourth and Fifth Amendments (Ass. 15, R. 76).

V. Argument

A

The District Court correctly held that the exclusive manufacturing agreement between Bausch & Lomb and Soft-Lite is legal and valid (Conclusion 7, R. 59).

As the basis for this holding the trial court found in part as follows (R. 58):

"33. Soft-Lite's object in developing these arrangements [for manufacture of Soft-Lite lenses and glass by Bausch & Lomb] was to obtain from a highly regarded domestic source a product of uniformly good quality. Bausch & Lomb's object was to secure a prospectively increasing outlet for its manufacture. The purpose of that portion of the arrangements whereby Bausch & Lomb agreed not to compete with Soft-Lite either by selling pink-tinted ophthalmic glass to other lens manufacturers or by selling pink-tinted lenses to the trade was to protect Soft-Lite. Soft-Lite has expended substantial sums for advertising and in the development of good will in connection with a new article of commerce.

"34. Bausch & Lomb did not enjoy a monopoly in the manufacture of glass for lenses, whether pink or otherwise. Other manufacturers of lenses had access to pink glass from other sources. The success of Soft-Lite stimulated emulation and competition."

There is no need to recite the details of the evidence; they amply support the findings; and the authorities sustain the conclusion of law that the manufacturing agreement is sanctioned by the Sherman Act despite the fact that it contains a limited restraint.

First clearly classified in *United States v. Addyston Pipe & Steel Co. et al.*, 85 Fed. 271, 281 (C. C. A. 6th, 1898), restraints of this nature regarded as reasonable (and therefore legal) listed in the *Restatement, Contracts* § 516, include

"(e) A bargain to deal exclusively with another;" provided that the bargain does not effect, or form part of a plan to effect, a monopoly. (For references to many illustrative cases, see 5 Williston, *Contracts* [Rev. ed., 1937] § 1645; and for New York cases, see *Restatement, Contracts, N. Y. Annot.* § 516.)

The proviso may be ignored, for there is no proof or even charge of monopolizing in the instant case.

We can find no clearer statement of the test we ask this Court to apply than that made by Judge Taft in the *Addyston* case, *supra*, page 282. He said:

" . . . In *Horner v. Graves*, 7 Bing. 735, Chief Justice Tindal, who seems to be regarded as the highest English judicial authority on this branch of the law . . ., used the following language:

'We do not see how a better test can be applied to the question whether this is or not a reasonable restraint of trade than by considering whether the restraint is such only as to afford a fair protection to the interests of the party in favor of whom it is given; and not so large as to interfere with the in-

terests of the public. Whatever restraint is larger than the necessary protection of the party requires can be of no benefit to either. It can only be oppressive. It is, in the eye of the law, unreasonable. Whatever is injurious to the interests of the public is void on the ground of public policy.'

"This very statement of the rule implies that the contract must be one in which there is a main purpose, to which the covenant in restraint of trade is merely ancillary. The covenant is inserted only to protect one of the parties from the injury which, in the execution of the contract or enjoyment of its fruits, he may suffer from the unrestrained competition of the other. The main purpose of the contract suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined. . . ."

We have no difficulty in relating this language to the case of the Soft-Lite defendants. The main purpose of the contract, to which the covenant in restraint is ancillary, is to provide for the satisfactory manufacture of Soft-Lite lenses and glass. The covenant was inserted only to protect Soft-Lite from the injury which, in the execution of the contract or enjoyment of its fruits, Soft-Lite might—we say would—suffer from the unrestrained competition of Bausch & Lomb.

The restraint is not "injurious to the interests of the public". By enabling Soft-Lite to market successfully a new article of commerce desired by the public, the restraint promotes the public interest.

That Soft-Lite needs the protection and demanded it is borne out by the testimony of Nathaniel Singer (R. 466, 469-70):

Bausch & Lomb was not pleased with the French glass it was grinding for Singer and requested harder glass, which Singer said he could not supply. Thereupon the Bausch & Lomb representative stated that if Singer would give Bausch & Lomb the specifications it would endeavor to make Soft-Lite glass. At this point Singer said:

"Well, the first thing my dad will ask me is, what protection have we?" (R. 466)

After talking to his father, Singer gave Bausch & Lomb the specifications. Shortly thereafter Singer was advised that Bausch & Lomb had decided to manufacture Soft-Lite glass and a trip to Rochester was suggested (Ex. 2, R. 638; 95). In the Bausch & Lomb office memorandum of the conversation on that trip it is stated:

"It is understood that we make the above Soft-Lite Glass for them only." (Ex. 2-A, R. 639; 95)

And Singer was assured orally before he released "the formula specifications" that, although Bausch & Lomb sold and would continue to sell colored lenses, it would make pink-tinted lenses exclusively for him (R. 469, 103-4).

We respectfully submit that on this showing it is clear that the restraint was demanded by Soft-Lite as a condition of the agreement to do business with its manufacturer; that the restraint granted, limited to pink-tinted lenses, affords necessary protection to Soft-Lite; that it is clearly and directly ancillary to the main purpose of the arrangement; that it is favorable to the interests of the public; and that it is a reasonable, and therefore a legal, restraint under the Sherman Act.

B.

The District Court correctly held that Bausch & Lomb has played no part in the Soft-Lite distribution system and has not agreed with Soft-Lite with respect to its selection, rejection, or discontinuance of, or relations with, its wholesale customers or retail licensees (Finding 32, R. 58; Conclusion 11, R. 59).

We refer again to the relations of Soft-Lite and Bausch & Lomb because, although the point was made, considered and decided in favor of the defendants in the trial court, the Government persists in contending that the manufacturing agreement is an integral part of the Soft-Lite distribution system and that the Bausch & Lomb defendants are parties to the establishment, operation, and maintenance of the system (Gov't Assignment of Errors 3, 4, 5, 8, 9, 11, 12, 24; R. 67-70).

So arguing, the Government relied below on the opinion of Mr. Justice HOLMES in *Swift and Company v. United States*, 196 U. S. 375 (1905), where, on appeal from a decree on demurrer, a complaint was sustained against the charge of indefiniteness, and a decree, attacked on the same ground, was affirmed but only as modified to restrain "certain specified devices, which the defendants are alleged to have used and intend to continue to use" (page 402).

The opinion is a potent reminder that "commerce among the States is not a technical legal conception, but a practical one, drawn from the course of business" (page 398); that "The plan may make the parts unlawful" (page 396). This we concede.

But the question in the *Swift* case was, "Does the Government's petition, with its statements of fact standing

unchallenged, discover . . . [a conspiracy to control the market of the nation for fresh meats]" (page 390). There is no such question here. The defendants did not move to dismiss the complaint for failure to state a cause of action; they challenged the Government's statements and went to trial; and the issue, now raised again, as to participation by Bausch & Lomb in the alleged conspiracy was determined in their favor.

In the findings of fact, as well as in the opinion, the District Court reviewed the facts as to the inception of and changes in the manufacturing agreement (Findings 7, 8, 9, R. 53), the relations of the defendants with the trade (Finding 13, R. 54) and with each other (Findings 18, 19, 29, 30, R. 55-7), the Bausch & Lomb wholesale affiliates (Findings 27, 28, 31, R. 57), and then found as ultimate facts the following:

"32. The exclusive manufacturing agreement made in 1924 between Bausch & Lomb and Soft-Lite has no connection with the Soft-Lite distribution system. When made in 1924, the parties did not envision the Soft-Lite licensing system established in 1933. Bausch & Lomb has played no part in the establishment, operation or maintenance of the Soft-Lite distribution system, either in connection with the aforesaid exclusive manufacturing arrangement or otherwise. Bausch & Lomb has not agreed with Soft-Lite with respect to its selection, rejection or discontinuance of relations with its wholesale customers or retail licensees."

(R. 58)

The *Swift* case was cited and considered below (47 F. Supp. at 399, R. 35). The doctrine of the case is conceded here. What we deny is that the opinion of Mr. Justice HOLMES on a question of law raised by demurrer, however luminous and significant as an exposition of the nature of

Sherman Act conspiracy, has any force after joinder and trial and determination of the issue of fact as to Bausch & Lomb's part in the alleged offense.

Our interest in the findings referred to and in the judgment dismissing the complaint on the merits against the Bausch & Lomb defendants springs from the fact that Soft-Lite is dependent on Bausch & Lomb and on the manufacturing agreement for pink-tinted lenses and glass, and that, if the agreement be annulled and the relations of Bausch & Lomb and Soft-Lite be terminated as demanded by the Government, Soft-Lite, the Singers, and Landis will be greatly handicapped, if not ruined—a small, independent, one brand business built on the imagination, initiative, and sales ability of three relatively small businessmen, and on the desire, if not need, of a fraction of the public for pink-tinted lenses of high, uniform quality, will be eliminated as a competitive factor of importance, if not wholly liquidated. With their manufacturing facilities, sales staffs, wholesale outlets, advertising resources, and other advantages, Bausch & Lomb and American Optical Company, and other competitors having superior manufacturing arrangements and wholesale outlets, will move in and take over the bulk of Soft-Lite's pink-tinted lens business.

That there is no basis in the evidence for the charges against it and for the judgment sought by the Government will be argued by learned counsel for Bausch & Lomb, and we shall not burden the Court with discussion that might be regarded as repetitious. We are confident that Bausch & Lomb counsel will satisfy the Court

- (a) that Soft-Lite selects and does business with its wholesale customers without agreement with Bausch & Lomb,

- (b) that the Soft-Lite retail licensing system (the restrictive features of which we do not defend here) was introduced and is operated solely by Soft-Lite, and
- (c) that the exchange of information and views by Bausch & Lomb and Soft-Lite concerning the latter's prices to its wholesale customers is normal and well within limits established by decisions of this Court.

There is one feature of Soft-Lite's business with Bausch & Lomb that merits separate comment by us. We refer to the fact that 60% of Soft-Lite's product is sold to wholesale concerns affiliated with Bausch & Lomb. As to this the court below found:

"27. Sixty per cent of the total sales of Soft-Lite lenses is made by six optical wholesalers in whom, over a period of years subsequent to 1924, Bausch & Lomb acquired majority stock interests. These six optical wholesalers (hereinafter termed the 'Bausch & Lomb affiliates') or their predecessor companies were all substantial customers of Soft-Lite before such affiliation, and they have continued as such. It was stipulated, for purposes of this trial only and for no other purposes, and subject to the conditions stated in the stipulation, that 'Bausch & Lomb, through its ownership of a majority of the outstanding voting stock of each of said wholesale companies, has power to co-ordinate and control the sales and pricing policies of said wholesale companies.'

"28. All of the optical wholesale customers of Soft-Lite, whether affiliated with Bausch & Lomb or not, have at all times been dealt with by Soft-Lite on the same terms and all have been cooperative with Soft-Lite in the operation and maintenance of Soft-Lite's prices and distribution system."

"31. . . . Soft-Lite sold its lenses to wholesalers who were in active competition with the affiliated wholesalers, and the affiliated wholesalers as well as the nonaffiliated wholesalers sold lenses which were competitive with Soft-Lites." (R. 57-8)

We need not review the details of testimony which fully support these findings. There is no direct evidence of Sherman Act conspiracy or agreement among Soft-Lite and the affiliates, and the "course of business", to borrow from Mr. Justice Holmes, furnishes no basis for inference of collusion.

Made by a leading manufacturer of optical goods, and so advertised nationally, Soft-Lite lenses are an expensive product for which there is a limited market. This market must be sought and served in such a manner as to make the most of Soft-Lite's national advertising and to differentiate clearly Soft-Lite lenses from other tinted lenses and especially other pink-tinted lenses. Manufactured and advertised as a quality product, Soft-Lites must be sold as such.

Soft-Lite sought Bausch & Lomb manufacture because it knew that Bausch & Lomb could produce an adequate supply of uniform quality and because the Bausch & Lomb name would reflect credit on the product. And so it has worked out, to the advantage of the buyer of pink-tinted lenses, who has been secure in the value of his purchase, and to the profit of Bausch & Lomb and Soft-Lite.

In the circumstances it is not remarkable—indeed, it is natural and proper—that Soft-Lite has sought to do business with the foremost wholesale houses, in six of which between 1925 and 1935 Bausch & Lomb acquired a majority interest. Soft-Lite did business with these con-

cerns before their affiliation; it continued to do business with them after affiliation. There is no evidence that Soft-Lite discriminated in their favor against other wholesale outlets; there is no evidence that the other outlets complained or have cause for complaint.

There are other reasons why Soft-Lite's relations with the affiliates must be regarded as fair and proper. Soft-Lite cannot do business with the wholesale branches of its powerful rival, American Optical Company; for that company is actively and successfully engaged in pushing its own pink-tinted lenses and would be expected to neglect or disparage Soft-Lites (R. 476-7, 482-3). Soft-Lite cannot, without prejudice to the standing and acceptance of its product, do business with firms known to specialize in inferior merchandise or who deal with unregistered optometrists or who falsely advertise that they sell Soft-Lite lenses (R. 130-1).

This sales policy is dictated, not by Bausch & Lomb or by agreement with anyone, but by Soft-Lite's judgment of its own best interest. One may disagree with the policy; the Antitrust Division may have different ideas as to the economics of lens manufacture and sale; but one cannot say that the Sherman Act precludes it.

It follows from all this that the proportion of its sales to affiliates of Bausch & Lomb is entirely consistent with what Soft-Lite regards as a vital interest (and who shall gainsay it?) in the promotion and sale of its lenses. Soft-Lite does a large business with these concerns because they are prominent and reputable and because they possess the means and the will for extensive promotion and distribution.

The trial court erred in holding that the Soft-Lite distribution system constitutes illegal agreements with wholesalers to charge uniform prices to retailers and to boycott retailers not licensed by Soft-Lite (Conclusions 3, 4, R. 59), and requiring the cancellation thereof (R. 62), and in restraining Soft-Lite from systematically suggesting wholesale or consumer prices for six months (R. 63).

The court also erred in holding illegal Fair Trade resale price maintenance contracts between Soft-Lite and wholesalers, and requiring the cancellation thereof (R. 62), and in restraining Soft-Lite from executing any such contracts for six months (R. 63).

The errors asserted are duly assigned (Def'ts' Assignment of Errors 1, 3, 4, 7, 8, 9, 10, 13, 14, 18, 19, 21, 23, 24, 26, 27, 29, 30, R. 72-8).

Soft-Lite operates in a narrow, fiercely competitive market; it has no wholesale or retail outlets of its own; its earnings depend entirely on the ability of Singer and his associates to sell a superior product for ultimate use by a relatively small number of persons. It is not at all remarkable, therefore, that we should find Singer and Landis working closely with distributors, wholesale and retail, striving to gain advantages for their lenses over rival lenses of all sorts and makes, employing a variety of advertising and promotional devices. Indeed, their constant effort to differentiate and push their product shows that the Soft-Lite defendants are moved, not by a desire to appease or share the market with their rivals, but by a strongly competitive impulse to overcome their rivals' advantages and to take business away from them.

That there is active competition in the sale of tinted lenses cannot be denied. Believing that the court below correctly held that the retail license provisions binding dealers to sell at locally prevailing prices and only to the public constitute illegal restraints, we suggest that the court's condemnation of the distribution system as a whole—that its finding that the distribution system constitutes illegal agreements with wholesalers as well as retailers—resulted from failure to make due allowance for the basic competitive conditions under which Soft-Lite operates and from confusion as to the effect of the authorities.

We shall argue that as to wholesalers there is no evidence of conspiracy and that, in any event, the cancellation of the Fair Trade contracts with wholesalers is not warranted.

1. There is no evidence of illegal agreements between Soft-Lite and wholesalers.

It is not claimed that there are any written or express agreements with wholesalers, and we submit that none can be implied.

As to this the court said (45 F. Supp. at 396, R. 30):

"True, there is no written agreement here between the distributor and the wholesalers as there was in *Dr. Miles Medical Co. v. John D. Park & Son's Co.*, supra [220 U. S. 373]. That, however, does not immunize the distribution system devised by Soft-Lite. Neither was there a written agreement in *Federal Trade Commission v. Beech Nut Packing Co.*, supra [257 U. S. 441], but that did not avail. The agreement is implicit in the operation of the system. The living reality of uniform prices from wholesalers to retailers, corre-

sponding to the written instructions of the distributor, of wholesalers' refusal to sell to unlicensed retailers, of surveillance of wholesalers by means of protection certificates and over retailers by 'shopping', compel the conclusion that between the wholesalers and the distributor there was agreement or at least acquiescence in a program of concerted action. . . ."

The "living reality" is that, coming into existence and operating in an intensely competitive environment, up against powerful and resourceful rivals, Soft-Lite has adopted and applied measures calculated to enable it to engage successfully in the struggle for survival. From the fact that a court and lawyers now say that certain written restraints on retailers are illegal, it does not follow that illegality is to be implied from sales and promotional measures used with wholesalers.

It is no evidence of Sherman Act conspiracy that Soft-Lite refuses to do business with wholesalers who specialize in inferior merchandise (R. 130), who sell on mail order to unregistered optometrists (R. 131), who falsely advertise that they distribute Soft-Lites (Ex. 173, R. 916; 432), or whose credit is not approved (R. 132). These reservations, dictated by consideration of its own interest, are evidence, not of conspiracy, but of business acumen and prudence.

The evidence, to which the Government may attach importance is a form letter sent to new wholesale accounts after they have been approved. The letter in full is as follows:

"We take pleasure in welcoming you as a Soft-Lite Distributor.

In accordance with the arrangements completed between you and our Mr. _____ we have shipped your qualifying Soft-Lite lens order. (Terms of payment are those agreed upon with Mr. _____ namely, that billing is to be made as of (date) and payments are to be made in four (4) equal monthly payments. Cash discount will be extended on the first payment if remittance is received within the cash discount period.) (The rest of the payments will be net.) As a Distributor, your purchases will be billed at the prices listed in the attached Distributor's price list and are subject to a bonus of 10¢ per pair on all purchases of single vision uncut lenses made during the preceding quarter, paid in check form at the end of each quarter.

A complete assortment of sales aids and advertising material will be sent you in a few days. For use on the direct mail promotional material with which you will be supplied from time to time, we would like to have your correct imprint for our files. Also, if you will send us the number of names on your statement mailing list, we shall be glad to provide regularly, a sufficient quantity for inserting with statements.

If you will give us the names of the salesmen, we shall be glad to add their names to our list and supply you and them with pertinent sales material from time to time.

In selling Soft-Lites to the retail trade, please be governed by the information found on page 17 of the Soft-Lite Stock Licensee price list.

As a Soft-Lite Distributor you have the privilege of opening new Soft-Lite Stock Licensee and Prescription Licensee accounts. The procedure is outlined on pages 17-20 of the Soft-Lite Stock Licensee Price List.

We are sending to you under separate cover a quantity of Stock Licensee applications and Prescription Licensees recommendation cards.

If there is any additional information you desire, please inquire.

We are sure that you will find the Soft-Lite Distributorship a very satisfactory and profitable investment.

Very truly yours,

SOFT-LITE LENS COMPANY, INC.

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(Ex. 36, R. 668; 153)

The price list referred to (Ex. 37, R. 669; 672-81, 154) contains suggested prices to be charged by wholesalers for a great variety of styles, sizes, and optical combinations. The use of such a list is consistent with the universal practice of the industry; the list is distributed to retailers as well as wholesalers; and without it they would be virtually helpless because of the infinite variety of styles and optical combinations required by users.

In the fifth paragraph of the form letter set forth above wholesalers are requested to be governed by information found on page 17 of the price list. This refers to the statement (Ex. 37, R. 669; 681, 154) that "Soft-Lite lenses are sold only to Soft-Lite Licensees."

The trial court and the Government assign importance to the protection certificates (Ex. 13, R. 652; 127) printed by Soft-Lite for ultimate distribution to wearers of the lenses. While these are numbered in such manner as to enable the source of the lenses to be traced, only one instance of such use was shown (Ex. 79, R. 795; 209), and Singer testified that the certificates are really used, and are so advertised, to prevent dealers from palming off inferior imitations of Soft-Lites and thus to give some assurance

to the public of the authenticity and value of its purchases (R. 482-3).

There is evidence that in general wholesalers charge the suggested prices and deal only with licensed retailers (R. 223). There is evidence that Soft-Lite ceased to do business with wholesalers who sold at less than the suggested prices (R. 455-6). There is no evidence that Soft-Lite ceased to do business with wholesalers who sold to unlicensed retailers.

We have stated the evidence offered against the Soft-Lite defendants in its extreme form. We have omitted explanations by Soft-Lite of particular transactions (e. g. Ex. 27, R. 659-62; 148).

The Government argues, and the District Court agreed, that all this adds up to a series of agreements between Soft-Lite and wholesalers. We respectfully submit that it amounts to nothing of the sort.

We concede, as we must, that agreement may be "implied from a course of dealing or other circumstances." *United States v. A. Schrader's Son, Inc.*, 252 U. S. 85, 99 (1920); *Frey & Son, Incorporated v. Cudahy Packing Company*, 256 U. S. 208, 210 (1921); *Federal Trade Commission v. Beech-Nut Packing Company*, 257 U. S. 441, 451-3 (1922).

We concede, as we must, that *United States v. Colgate & Company*, 250 U. S. 300 (1919), on which we rely, was an appeal from a judgment sustaining a demurrer to an indictment which, as interpreted by the District Court, "failed to charge that Colgate & Company made agreements, either express or implied, which undertook to obligate vendees to observe specified resale prices; and it was treated 'as alleg-

ing only recognition of the manufacturer's undoubted right to specify resale prices and refuse to deal with anyone who failed to maintain the same.''' *Schrader's Son* case, 252 U. S. at 99.

We insist, however, that in a free economy it is and must be the law.

" . . . that in prosecutions under the Sherman Act a trader is not guilty of violating its terms who simply refuses to sell to others, and he may withhold his goods from those who will not sell them at the prices which he fixes for their resale. . . .'' *Beech-Nut* case, 257 U. S. at 452-3.

We suggest that, having regard for the relative size of Soft-Lite and the competitive conditions with reference to which it must operate, the Soft-Lite defendants should have the full benefit of the principle recognized in the following cases:

Federal Trade Commission v. Sinclair Refining Company, 261 U. S. 463, 475-6 (1923), where, in respect of powers of the commission, the Court made the following statement applicable to the powers of a court under the Sherman Act:

" . . . It has no general authority to compel competitors to a common level, to interfere with ordinary business methods or to prescribe arbitrary standards for those engaged in the conflict for advantage called competition. The great purpose of both statutes was to advance the public interest by securing fair opportunity for the play of the contending forces ordinarily engendered by an honest desire for gain. And to this end it is essential that those who adventure their time, skill and capital should have large freedom of action in the conduct of their own affairs."

Federal Trade Commission v. Curtis Publishing Company, 260 U. S. 568, 582 (1923):

"Effective competition requires that traders have large freedom of action when conducting their own affairs. Success alone does not show reprehensible methods, although it may increase or render insuperable the difficulties which rivals must face. The mere selection of competent, successful and exclusive representatives in the orderly course of development can give no just cause for complaint, and, when standing alone, certainly affords no ground for condemnation under the statute."

Locker et al. v. American Tobacco Co. et al., 218 Fed. 447, 450 (C. C. A. 2d, 1914) (a Sherman Act case):

"... The laws of trade are not wholly altruistic, they may often be hard and selfish, but it is no part of the duty of courts to attempt to enforce the precepts of the decalogue. In the struggles engendered by fierce competition, losses must occur and injustice may be done, but this is frequently inevitable and cannot be prevented so long as the parties keep within the law."

United States v. Great Western Sugar Co., 39 F. (2d) 149, 151 (D. C. Neb., 1929):

"... It would be going far to say that a dealer may not buy or sell at a uniform price that yields him a profit if the only objection is that he has the intention to obtain customers, who would otherwise deal, in interstate commerce, with competitors at a different price. . . ."

United States v. Aluminum Co. of America et al., 44 F. Supp. 97, 204 (S. D. N. Y., 1941):

"... if the public is to enjoy, as it is entitled to enjoy, the benefits of competition, then some leeway must be allowed to those actively engaged in oppo-

sition to each other before malevolent motives may properly be attributed to them. . . ."

In the *Beech-Nut* case, 257 U. S. 441, it had been found by the Federal Trade Commission that certain "practices in trading" (page 455) constituted "unfair methods of competition", and the finding was sustained on the ground (pages 454, 456-7) that the respondent's conduct was against public policy because it had a dangerous tendency unduly to hinder competition or to create monopoly. (Mr. Justice HOLMES dissented in an opinion in which Mr. Justice McKENNA and Mr. Justice BRANDEIS concurred. Mr. Justice REYNOLDS dissented in a separate opinion.)

The Court stated that the facts found by the commission showed that the Beech-Nut system went far beyond the refusal to sell to persons who would not sell at stated prices (page 454). Facts stressed by the Court include the following:

The Beech-Nut Company sold to jobbers, wholesalers, and retailers. Dealers who had been removed from its list for failure to resell at suggested prices, and for selling to other dealers who did not maintain such prices, were reinstated "upon the basis of declarations, assurances, statements, promises, and similar expressions" that satisfied the company that thereafter resale prices would be maintained (pages 449-51).

The company added to its list dealers who declared that they would resell at the suggested prices and would not sell to other dealers who did not maintain such prices (page 449).

The company repeatedly traced instances of price-cutting and thereafter refused to supply dealers who engaged in the practice or who sold to price-cutters (pages 449-50).

Competition among retail distributors was practically suppressed (page 455).

The Court expressly recognized that the Sherman Act was not applicable except as a declaration of policy "to be considered in determining what are unfair methods of competition" (page 453). And it expressly refrained from placing its decision upon the existence of agreements, express or implied. It said (257 U. S. at 455):

"From this course of conduct a court may infer, indeed cannot escape the conclusion, that competition among retail distributors is practically suppressed; for all who would deal in the company's products are constrained to sell at the suggested prices. Jobbers and wholesale dealers who would supply the trade may not get the goods of the company, if they sell to those who do not observe the prices indicated or who are on the company's list of undesirables, until they are restored to favor by satisfactory assurances of future compliance with the company's schedules of resale prices. *Nor is the inference overcome by the conclusion stated in the Commission's findings that the merchandising conduct of the company does not constitute a contract or contracts whereby resale prices are fixed, maintained, or enforced. The specific facts found show suppression of the freedom of competition by methods in which the company secures the coöperation of its distributors and customers, which are quite as effectual as agreements express or implied intended to accomplish the same purpose. . . .*" (Italics ours)

In short, a case not of agreements but of unfair methods of competition.

This is not such a case. It is a Sherman Act case in which certain agreements, express or implied, must be shown and which, for want of such showing, is governed

by the doctrine of the *Colgate* case, where the Court said (250 U. S. at 307):

“ . . . In the absence of any purpose to create or maintain a monopoly, the act does not restrict the long recognized right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell. . . . ”

That there are no written agreements with wholesalers was conceded by the court below. The holding that “agreement is implicit in the operation of the system” is not warranted by the evidence or the authorities.

It follows that the judgment requiring the cancellation of the supposed agreements with wholesalers and enjoining Soft-Lite from suggesting resale prices for six months should be reversed.

2. The District Court erred in attempting to invalidate the Fair Trade contracts.

Stating that the Fair Trade contracts “came into existence as a patch upon an illegal system of distribution of which they have become an integral part” (45 F. Supp. at 399, R. 36), the court adjudged the contracts illegal and void, required Soft-Lite to give notice of cancellation (R. 62), restrained their enforcement (R. 63), and forbade the execution of new Fair Trade contracts for six months after notice of cancellation of the existing contracts (R. 63).

Owing to the stay the contracts are in force pending determination of these appeals.

The action of the District Court places Soft-Lite in an awkward position in relation to its customers and under a

disadvantage vis-a-vis its competitors, and is not warranted by the facts or the law.

What this Court said about the Fair Trade agreements involved in the *Univis* case, 216 U. S. 241, 252-4, is not applicable here, and the trial court so held (45 F. Supp. at 399, R. 36). The Soft-Lite contracts (Ex. S, S1, R. 990-7; 530) apply only to lenses and blanks that pass from Soft-Lite to wholesaler to retailer without change; they do not apply to articles to which work or material is added by the wholesaler.

The contracts are strictly within the Miller-Tydings Amendment (50 Stat. 693), printed on pages 2 and 3 above, and the laws of the states in which they are effective. See, e. g. N. Y. Cons. Laws (McKinney's, 1941), Book 19; General Business Law Art. XXIV-A; New York and other State Fair Trade Laws collected 2 C. G. H. Tr. Reg. Serv., p. 7501 *et seq.*

The court said (45 F. Supp. 399-400, R. 36-7):

"... They suffer, however, from the circumstance that they came into existence as a patch upon an illegal system of distribution of which they have become an integral part. It has already been found herein that the system devised by Soft-Lite created not only a perpendicular system of control but, in addition, two horizontal systems, one involving competing wholesalers and the other competing retailers.

"The facts herein do not permit the treatment of the resale price maintenance agreements as isolated transactions separate and apart from the scheme of controlled distribution as a whole. They have become part of a system of horizontal agreements and, as such, do not enjoy the protection of the Miller-Tydings Act."

It begs the question to say that the contracts have become part of a system—a system of horizontal agreements. The simple fact is, they exist and are used, whether they are part of a system or not, and they are authorized by law.

Indeed, Fair Trade contracts, sanctioned by Section 1 of the Sherman Act as amended, presuppose state-wide systems under which all dealers in the same class having notice of the prices stipulated are obliged to observe them. In *Calvert Distillers Corporation v. Nussbaum Liquor Store, Inc.*, 166 Misc. 342, 2 N. Y. S. (2d) 320 (Sup. Ct. N. Y. County, 1938), Mr. Justice Shientag said (166 Misc. at 344-5):

“With the economic soundness or wisdom of the statute the courts are not concerned. It expresses a new business policy by the law-making body of the State. It is not to receive such a narrow or strict judicial construction as virtually to destroy its purpose. Rather is it to receive a judicial construction designed to carry out that new policy, to effectuate its primary purpose, and to eliminate or to minimize, as far as possible, any hardship or inequity that may result from its application. . . .

“The attitude of the courts, however, must not be one of hostility to the new law as ‘an alien intruder in the house of the common law, but a guest to be welcomed and made at home there as a new and powerful aid in the accomplishment of its appointed task of accommodating the law to social (and; it may be added parenthetically, business) needs.’ (Stone, *The Common Law in the United States*, [1936] 50 Harv. Law Rev. 4, 15.)”

And he formulated certain rules regarded as applicable to the issues before him, including (166 Misc. at 346):

“3. Notice of the fixed prices [and] of the changes thereof must be given to all who are sought to be bound

thereby, and this applies not alone to direct changes in prices, but also to changes in discounts and other general business practices reflected in the price of the commodity.

.

"5. A dealer who does not sign a price maintenance agreement is just as amenable to the act as the one who does sign. Before any relief may be obtained against him, however, it must appear that he had notice of the fixed prices and of all changes thereof at the time of sale.

"6. Implicit in the statute is the requirement that the prices fixed for resale by retailers be uniform in any one competitive area. Implicit also is the requirement that there shall be no unfair discrimination in prices to retailers. That does not preclude discounts or fair variations in prices having a general application in the trade based, for example, upon quantity sold or time of payment."

The *Calvert* case in the New York Supreme Court was followed in *Calvert Distillers Corporation v. Stockman*, 26 F. Supp. 73 (E. D. N. Y., 1939).

The Fair Trade contracts here in question relate only to finished articles, not to articles to which work or material is added by the reseller. They are sanctioned by the state laws and by the Miller-Tydings Act. They should not be condemned by any such loose characterization as "that they came into existence as a patch upon an illegal system."

We have analyzed the Soft-Lite distribution practices. We have conceded that express agreements restricting retailers are invalid. We think we have demonstrated that sales practices respecting wholesalers do not constitute agreements, express or implied. We earnestly submit that the Fair Trade contracts are clearly legal.

To cancel the existing Fair Trade contracts and restrain their enforcement, and to forbid the execution of new contracts for six months, would cripple Soft-Lite and serve no interest except the interest of Soft-Lite's competitors who are under no such restraint. Such action would interrupt, if it did not seriously impair or destroy, beneficial relations built up by the exertion of competitive sales effort over a period of twenty years, would result in loss of continuity of business and of good will, and would thus cause needless and inequitable injury to the Soft-Lite defendants without any public advantage.

D

The court correctly refused to enjoin Soft-Lite and its officers from engaging in interstate commerce unless Soft-Lite agrees to sell its lenses and blanks to any person, firm, or corporation who offers and is willing to pay cash therefor, and to fill and otherwise handle the order of such person or company without discriminating against him or it.

This point would not merit reference, much less argument, but for the fact that it is assigned as error (Gov't Assignment of Errors 21, R. 69) and the Government has stated that it may be argued here.

The defendants Singer and Landis may perhaps dream of the day when the demand for their unpatented product will be so great that their company will be regarded and treated as a public utility. Until that day arrives, or so long as any freedom remains to small private enterprises, it is unlikely that the courts will impose any such obligation. *Great Atlantic & Pacific Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (C. C. A. 2d, 1915), affirming (Judge Hough)

224 Fed. 566 (S. D. N. Y., 1915); accord *Federal Trade Commission v. Raymond Bros.-Clark Company*, 263 U. S. 565 (1924).

E

The provision of the judgment allowing future discovery by the Government must be vacated as in violation of the Soft-Lite defendants' rights guaranteed by the Fourth and Fifth Amendments.

Error is assigned (Def'ts' Assignment of Errors 15, R. 76).

The judgment contains a provision (Paragraph 9, R. 63-4) under which the Department of Justice is given the right

- (a) To examine the defendants' books, ledgers, accounts, correspondence, memoranda, and other records and documents relating to any of the matters contained in the judgment—"such access to be subject to any legally recognized privilege".
- (b) To interview officers or employees of the defendants without interference, restraint, or limitation.
- (c) To require the defendants to submit such reports with respect to any of the matters contained in the judgment as from time to time may be necessary for the purpose of enforcement of the judgment.

This, we submit, sanctions invasion by the Government of the Soft-Lite defendants' persons, houses, papers, and effects, and requires Singer and Landis to be witnesses against themselves, contrary to their rights guaranteed by the Constitution.

The vague reference to a possible privilege may be disregarded, for it relates only to the first sentence of the provision giving the right to examine books and papers.

The history of the provision has some bearing. In June 1939 the Antitrust Division adopted the policy of requiring agreement to future discovery as the price of disposition of Sherman Act cases by consent decree. The first provision of the sort here questioned which we have been able to find appears in the decree filed June 6, 1939 in the Southern District of New York in *United States v. Imperial Wood Stick Company, Inc. et al.* (the Candy Stick case), 3 C. C. H. Tr. Reg. Serv. ¶25, 289. The provision was more definitely formulated, and the recognition of a possible privilege first introduced, in the decree filed April 23, 1940 in the same court in *United States v. National Container Association et al.*, Id. ¶25, 434. Since June 1939 similar discovery provisions have appeared in many, and we think all, antitrust consent decrees obtained by the Division.

There is much to be said for proper short cuts to discovery in the trial of cases. An argument can be made for the use of such short cuts in the policing of consent decrees, even though the right is exacted as the price of peace. We think that nothing can be said for a judgment giving the Government virtually unlimited right of future discovery in a Sherman Act case determined by litigation.

There is no difference of substance between the discovery authorized by judgment in this case and that granted by legislation, and condemned by this Court, in *Boyd v. United States*, 116 U. S. 616 (1886).

The Court there said:

“ . . . It is true that certain aggravating incidents of actual search and seizure, such as forcible entry into a man's house and searching amongst his papers are wanting, and to this extent the proceeding under the act of 1874 is a mitigation of that which

was authorized by the former acts; but it accomplishes the substantial object of those acts in forcing from a party evidence against himself. It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure." (page 622)

" . . . any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment [Lord Camden's in *Entick v. Carrington*, 19 How. St. Tr. 1029 (1765)]. In this regard the Fourth and Fifth Amendments run almost into each other." (page 630)

It must be assumed that the Soft-Lite defendants will obey the Sherman Act and any judgment that this Court may approve. If they fail in this regard, however, they will be subject, not only to exercise of the District Court's reserved power to make such further orders as may be necessary or appropriate for carrying out the judgment (R. 64), but to criminal prosecution for violation of the Sherman Act itself and to criminal contempt proceedings. These possibilities emphasize the accuracy of Mr. Justice MILLER's concurring remarks in the *Boyd* case. He said (116 U. S. at 639):

"And I am quite satisfied that the effect of the act of Congress is to compel the party on whom the order of the court is served to be a witness against himself. The order of the court under the statute is in effect a subpoena *duces tecum*, and, though the penalty for the witness's failure to appear in court with the crimi-

nating papers is not fine and imprisonment, it is one which may be made more severe, namely, to have charges against him of a criminal nature, taken for confessed, and made the foundation of the judgment of the court. That this is within the protection which the Constitution intended against compelling a person to be a witness against himself, is, I think, quite clear."

In the *Boyd* case the papers had to be produced in court on motion of the United States Attorney. The power here granted is more far reaching (the right to interview the defendants and to require reports is unlimited) and subject to greater abuse.

Accord, *Federal Trade Commission v. American Tobacco Company*, 264 U. S. 298 (1924).

This is not a case of requiring a corporation to produce its books before a court in contempt proceedings or before a grand jury investigating an alleged violation of the Sherman Act. It is a case of giving the persons who happen to hold office in the Antitrust Division unlimited subpoena power—the power to inquire without a showing of probable cause and without a warrant into the affairs of Soft-Lite, Singer, and Landis.

In *Interstate Commerce Commission v. Brimson*, 154 U. S. 447 (1894), the Court said (at page 478):

" . . . Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can be invested with, a general power of making inquiry into the private affairs of the citizen. . . ."

Nor can the Antitrust Division be invested with any such power by judgment of a District Court.

If liberty of the press is to be preserved against abridgement by injunction (*Near v. Minnesota*, 283 U. S. 697), we submit that the freedoms guaranteed by the Fourth and Fifth Amendments should be preserved against such abridgement.

VI. Conclusion

The judgment should be affirmed and modified as follows:

The judgment should be affirmed as regards the Bausch & Lomb defendants and the Bausch & Lomb-Soft-Lite relationship.

The judgment should be affirmed in respect of agreements between Soft-Lite and retailers restricting the retailers' choice of customers and resale prices.

The judgment should be reversed in so far as it relates to Soft-Lite's relations with wholesalers.

The provisions cancelling the Fair Trade contracts, enjoining their enforcement, and enjoining the execution of new Fair Trade contracts, should be vacated.

The provision enjoining the systematic suggestion of resale prices should be vacated.

The provision for discovery should be vacated.

Respectfully submitted,

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